No. 75-1779

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

JACK L. CHESTNUT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A54-74) is not yet reported. The opinions of the district court (Pet. App. A16-54) are reported at 394 F. Supp. 581 and 399 F. Supp. 1292 (S.D. N.Y.).

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1976. A petition for rehearing was denied on May 5, 1976. The petition was not filed until June 7, 1976, and is therefore out of time under Rule 22(2) of this Court's rules. In any event the petition lacks merit.

QUESTIONS PRESENTED

1. Whether prosecution violated the *ex post facto* clause of the Constitution.

2. Whether 18 U.S.C. 610 (1970) (the prohibition against corporate campaign contributions) was unconstitutionally vague.

3. Whether venue was properly laid in the Southern District of New York.

STATUTORY PROVISIONS INVOLVED

At the time of the offense charged in the indictment 18 U.S.C. 610 (1970) provided in pertinent part:

> It is unlawful . . . for any corporation whatever . . . to make a contribution or expenditure in connection with any election at which . . . a Senator [is] . . . to be voted for, . . . or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.
>
> * * * *

At the time of the offense charged in the indictment 18 U.S.C. 591 (1970) provided in pertinent part:

> When used in [section] 610 of this title—
>
> * * * *
>
> The term "contribution" includes a gift, subscription, loan, advance, or deposit, of money, or anything of value, and includes a contract, promise, or agreement to make a contribution, whether or not legally enforceable;
>
> The term "expenditure" includes a payment, distribution, loan, advance, deposit, or gift, of money, or anything of value, and includes a contract, promise, or agreement to make an expenditure, whether or not legally enforceable:

In 1972 18 U.S.C. 610 was amended to include a definition of "contribution or expenditure" which provides in pertinent part:

> * * * *
>
> As used in this section, the phrase "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business.
>
> * * * *

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of causing another to accept and receive an illegal corporate campaign contribution, in violation of 18 U.S.C. 610 and 2. He was sentenced to four months' imprisonment and fined $5,000. The court of appeals affirmed in a thorough opinion (Pet. App.) on which we rely.

The evidence is summarized in the opinion of the court below (Pet. App. A56-A60). Briefly it showed that petitioner, a Minneapolis attorney, was the manager of Hubert H. Humphrey's 1970 Senatorial campaign in Minnesota. As part of that campaign, in the spring of 1970, petitioner agreed with the general manager of the Associated Milk Producers, Inc. (AMPI), a dairy cooperative, that it would pay $12,000 toward the Humphrey campaign debt owed to Lennen Newell, Inc. (L & N), a New York advertising agency. Thereafter, petitioner sent AMPI four L & N invoices, each for $3,000, and AMPI in turn drew two $6,000 checks on its corporate account payable to L & N. These checks were sent to petitioner in Minneapolis, and the checks were, thereafter, deposited in the L & N bank account in New York City.

In his own defense, petitioner testified that it was his understanding that any campaign donations from AMPI were to come from the Trust Agricultural Political Education fund, a political fund made up of voluntary donations from the members of AMPI. He also denied that he had seen the L & N checks that AMPI had sent to his office.

ARGUMENT

1. Petitioner contends that he was subjected to *ex post facto* prosecution for causing another to "receive" an illegal campaign "contribution." He asserts that his indictment was returned under the 1972 version of 18 U.S.C. 610, rather than the 1970 version of that statute in force when the offense was allegedly committed, and that the 1970 version was materially different from the 1972 version because it did not include the word "payments" in the definition of "contributions" and therefore could not cover the offense charged in the indictment.

First, petitioner's contention that he was charged under the 1972 version of 18 U.S.C. 610 lacks a factual foundation. Petitioner bases his claim (Pet. 8) on the incompleteness of the statutory citation in the indictment, the similarity of the indictment to the language of the 1972 amendment, and the fact that the 1972 version of the statute was attached to a press release issued by the prosecution. As the courts below stated, however, it is the allegations in the indictment that control. See e.g., *United States* v. *Hamling*, 418 U.S. 87, 117. Thus, the courts below correctly determined that the unexplained episode in which the 1972 statute was appended to the press release had no impact on this issue and that any similarity to the language of the 1972 statute was inconsequential since, "[t]he allegations which spell out the payment by AMPI to L & N for the services it rendered to the Humphrey campaign merely describe the details whereby it is charged the defendant engaged in artifice or subterfuge to conceal the receipt of the contribution." (Pet. A26; A61-62). Likewise because the non-conformity in the indictment, viewed in light of the 1970 version, consisted merely of omission of the definitional section's number and the notation that the statute had been amended, the indictment could not have misled petitioner as to the crime with which he was charged, and there accordingly were no grounds to warrant dismissal Rule 7(c), Fed. R. Crim. P., *United States* v. *Colorabro*, 467 F. 2d 973, 981 (C.A. 2), certiorari denied, 410 U.S. 926; *United States* v. *Riviera*, 513 F. 2d 519, 533, n. 21 (C.A. 2).[1]

Second, petitioner's contention that his prosecution was *ex post facto* lacks a legal foundation. Petitioner asserts that the payment by AMPI to L & N was really an "expenditure" rather than a "contribution," as charged in the indictment, contending that expenditures are indirect payments while contributions include only gifts or direct payments. He then reasons that, since the 1970 version of section 610 did not make it a crime to "receive" an "expenditure," the indictment failed to charge an offense.

But contrary to petitioner's contention, there is no material difference between section 610 as it existed in 1970 when he allegedly committed this offense and section 610 as it existed after amendment in 1972. As this Court held in *Pipefiters* v. *United States*, 407 U.S. 385, the purpose of the 1972 amendment to section 610 was merely "to codify the court decisions interpreting [and the legislative history explicating] section 610...

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[1]The court furthermore observed (Pet. A62) that any doubts petitioner might have entertained as to which version of the statute formed the basis of his indictment should have been resolved by the district court's pretrial ruling on this very issue.

and to spell out in more detail what a labor union or corporation can or cannot do in connection with a federal election." *Id.*, at 410-411. Since there were no substantive changes made in the section, petitioner's prosecution could not have been *ex post facto*.

In any event, it is clear that the payment in this case qualified as a "contribution" within the meaning of the pre-1972 statute. In *United States* v. *Auto Workers*, 352 U.S. 567, this Court, after carefully examining the legislative history of the original statute, concluded that Congress had added the term "expenditures" to section 610 when it passed the Taft Hartley Act in 1947 because certain labor unions were arguing that the term "contribution" covered only direct payments to candidates or political committees and not the union's "expenditure of its own funds to state its position to the world." *Id.* 580. Congress therefore added the proscription against expenditures "in order to avoid the possibility of the emasculation of the statutory policy through a narrow judicial construction of contributions." *Ibid.* Thus, even if "expenditures" were not encompassed by the term "contributions," as Congress in fact believed when it passed the precautionary legislation which added the term "expenditures" to section 610, it is clear that a direct payment to a candidate or political committee, such as is involved here, is a "contribution" as that term has consistently been interpreted.

2. Petitioner next argues that, if the pre-1972 versions of sections 591 and 610 were intended by Congress to reach the conduct alleged in the indictment, they are unconstitutionally vague because a potential receiver could not determine from the statutory language that a payment of a campaign bill by a third party is a "gift, subscription, loan, advance, or deposit" within the meaning of "contribution" and not a "payment" or

"distribution" within the meaning of "expenditure." Petitioner's contention was properly rejected by the courts below (Pet. A32-40; A73-74):

> * * * It borders on the frivolous to suggest that the clearly defined specific prohibition against the receipt or acceptance by any person of union or corporate contributions is so vague that "men of common intelligence must necessarily guess at its meaning." The statutes do not leave judges and jurors free to decide what is permitted and what is prohibited in each case. Their terms are sufficiently clear and definite to meet constitutional scrutiny for vagueness. Moreover, as the Supreme Court has recently stated, "even if the outermost boundaries of [the statute] may be imprecise, any such uncertainty has little relevance here where [defendant's] conduct falls squarely with the 'hard core' of the statute's proscriptions . . ." [footnotes omitted]

As we have already noted, it has never been doubted that a direct payment of the obligation of a campaign committee is a "contribution" within the meaning of section 610. See *United States* v. *Auto Workers*, *supra*. Indeed, this Court, in its recent decision in *Buckley* v. *Valeo*, No. 75-436, decided January 30, 1976, slip opinion at 72, so construed the term "contribution" in 18 U.S.C. 591 as amended (but for the purposes of petitioner's claim not materially changed from the definition in affect in 1970):

> In Part I we discussed what constituted a "contribution" for purposes of the contribution limitations set forth in 18 U.S.C. § 608(b). We construed that term to include, not only contributions made directly or indirectly to a candidate, political party, or campaign committee, and contributions made to other organizations or individuals but earmarked for political

> purposes, but also *all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate.* [Emphasis added]

Since, as the district court correctly concluded, there is no doubt that the pre-1972 statute was clear enough to provide a person of ordinary intelligence adequate notice that the conduct involved here was illegal, it obviously was not void for vagueness. See e.g., *Buckley* v. *Valeo*, *supra* at 71; *United States* v. *National Dairy Products Corp.*, *supra* at 32-33; *United States* v. *Harriss*, 347 U.S. 612, 617; *Jordan* v. *De George*, 341 U.S. 223, 230; *Lanzetta* v. *New Jersey*, 306 U.S. 451; *Sproles* v. *Binford*, 286 U.S. 374, 393.

3. Finally, petitioner asserts that trial in New York, rather than in Minnesota, was constitutionally impermissible because every element of the transaction, except the actual deposit of the checks, occurred outside New York. Petitioner contends that the offense, if any, consisted of his actions in Minnesota, i.e., causing the unlawful contribution, rather than his causing L & N's receipt of the checks in New York. But clearly the substantive offense charged here is the actual receiving and accepting of an unlawful contribution. Section 2 of title 18 makes punishable as a principal one who willfully causes another to commit an offense but itself does not define a crime. *United States* v. *Gerhart*, 275 F. Supp. 443, 445 (S.D. W.Va); see also, *United States* v. *Bozza*, 365 F. 2d 206, 222 (C.A. 2); *United States* v. *Campbell*, 426 F. 2d 547, 553 (C.A. 2). The constitutional standards for venue concern the locality of the substantive offense rather than the location of the offender. *Armour Packing Co.* v. *United States*, 209 U.S. 56, 76; see also *Travis* v. *United States*, 364 U.S. 631, 634.

Venue in the Southern District was constitutionally proper because the deposit of the checks in New York, where the principal offices and officers of L & N were located, constituted the essential element of the offense of accepting and receiving an unlawful contribution. Until the checks were placed in the LTN account, the campaign debt was not discharged and no unlawful contribution had been received. It is established that, when a check is used to make a forbidden payment, venue is proper where the check is deposited. *Burton* v. *United States*, 196 U.S. 283; *United States* v. *McMaster*, 343 F. 2d 176, 181 (C.A. 6), certiorari denied, 382 U.S. 818.[2]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

CHARLES F. C. RUFF,
Special Prosecutor.

SIDNEY M. GLAZER,
JOSEPH S. DAVIES, JR.,
Attorneys.

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[2]This Court's opinion in *Burton* v. *United States*, 202 U.S. 344 (*Burton II*), upon which petitioner principally relies, is inapposite. As the court of appeals noted (Pet. A69, fn. 6), in that case this Court discussed venue only as it related to a new count in the indictment added after this Court's opinion in *Burton I* and charging "agreement to receive a compensation". There this Court upheld the jury's finding that the unlawful "agreement" occurred in Missouri.